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No. 95-1873

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GUY E. ADAMS, *et al.*
Petitioners,

v.

CHARLIE FRANK ROBERTSON AND LIBERTY NATIONAL LIFE INSURANCE COMPANY,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR EXXON CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

INTEREST OF *AMICUS CURIAE*

Amicus curiae Exxon Corporation is a leading oil company with operations throughout the United States and the world. Exxon is a defendant in *In re Exxon Valdez*, No. A89-0095-

CV (D. Alaska), consolidated litigation arising from the 1989 grounding of the tanker EXXON VALDEZ in Prince William Sound, Alaska. The case is one of the largest in the history of this country, involving five separate compensatory damages classes and thousands of individual claimants. Over more than seven years of proceedings, the district court has issued over 300 pre-trial and post-trial orders, and the Ninth Circuit Court of Appeals has decided or has pending before it more than a dozen appeals.

As part of that litigation, the district court certified a "mandatory" (*i.e.*, no opt-outs allowed) punitive damages class under Federal Rule of Civil Procedure 23(b)(1)(B).[1] The certification made possible the trial of all punitive damages claims arising from the EXXON VALDEZ grounding in a single proceeding and avoided the prospect of multiple punitive damages trials in both federal and state courts by multiple plaintiffs alleging the same misconduct in connection with the same maritime accident. The consolidation of those punitive damages claims into a single, non-opt-out class is a landmark in the sensible and efficient use of mandatory class procedures under Rule 23 in a

[1] The district court certified the punitive damages class on Exxon's motion. *In re Exxon Valdez*, *supra*, Order No. 204 (D. Alaska Apr. 15, 1994). The Ninth Circuit denied a mandamus petition by certain plaintiffs challenging the certification, *Chugach Alaska Corp. v. United States Dist. Ct.*, No. 94-70174 (9th Cir. Apr. 28, 1994), and dismissed an interlocutory appeal for lack of appellate jurisdiction. *Chugach Alaska Corp. v. Exxon Corp.*, 26 F.3d 130 (9th Cir. 1994) (Table); *see Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

manner entirely consistent with the due process rights of class members.[2]

Petitioners in this case and the *amici* trial lawyer organizations ask this Court to endorse a sweeping proposition that due process requires states to afford class members the opportunity to exclude themselves from any class action involving claims "wholly or predominantly" for money damages. *See* Pet. Br. at 20-21. In Exxon's view, petitioners and the trial lawyers seriously misread this Court's prior cases — especially *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) — and urge upon the Court an overbroad principle that would wrongly cast doubt on the legitimate and beneficial use of mandatory class actions in cases such as *Exxon Valdez*. Exxon accordingly urges the Court to decline the invitation to issue new constitutional pronouncements broader than necessary to decide the issues truly presented by this case.

SUMMARY OF ARGUMENT

1. The law has long approved mandatory joinder of competing monetary claims against a "limited fund." Federal Rule of Civil Procedure 23(b)(1)(B) expressly recognizes this principle, authorizing certification of

[2] The class punitive damages trial resulted in a punitive award of $5,000,000,000 on which the district court, upon conclusion of further proceedings culminating in settlement of all remaining claims for compensatory damages, has recently entered judgment. As of this writing, Exxon's appeal of the merits of the punitive award awaits the district court's decision on a pending motion to amend the form of the judgment under Federal Rule of Civil Procedure 59(e).

mandatory classes where allowing individual litigation would risk foreclosing or impairing the claims of similarly situated claimants not parties to the adjudication. In recent years, courts have invoked this provision to certify mandatory classes in mass tort and other multiple claim cases where litigation of initial claimants' compensatory damage claims would deplete a defendant's resources before later claimants could be satisfied. In the punitive damages context, courts have extended the principle to cases where the first tried claims would likely exhaust legal limits on the amount of punitive damages that could be awarded. In both situations, the mandatory class procedure enables equitable disposition of similarly situated claims against a "limited fund," akin to interpleader and analogous equitable proceedings. In the punitive damages context, mandatory certification also affords courts, in appropriate cases, a means to address the vexing problem of seriatim multiple punishment for the same course of conduct.

2. *Shutts* does not hold such certification unconstitutional. The due process issue in *Shutts* was purely jurisdictional: whether a state could constitutionally bind absent class members not otherwise subject to personal jurisdiction within the state. The Court held that a state could do so if it afforded such class members a reasonable opportunity to opt out in addition to the class action due process requirements of notice, an opportunity to be heard and adequate representation by a named plaintiff. For due process purposes, the failure to opt out after constitutionally sufficient notice could be deemed the equivalent of consent to personal jurisdiction if it was otherwise lacking. *See* 472 U.S. at 806-14. By the same token, *Shutts* neither holds nor implies that due process requires an independent right to opt

out when personal jurisdiction is otherwise present. On the contrary, the Court emphasized, consistent with its earlier cases, that the interests of class members properly subject to personal jurisdiction are sufficiently protected by the requirements of adequate representation and notice of the opportunity to object or to participate in the litigation. Finally, *Shutts* did not speak at all to the situation involving competing claims to a limited fund (in the punitive damages context or otherwise). The Court expressly declined to address the due process requirements for binding absent class members in class actions seeking equitable relief, and it recognized that the case before it did not involve a limited fund. *Id.* at 811 n.3, 820.

3. Given a proper reading of *Shutts*, Exxon agrees with respondents that on this record, the judgment below can be affirmed on the ground that the objecting class members have waived any jurisdictional objection by affirmatively litigating the merits of the proposed class settlement. However, if the Court is not inclined to dispose of the case on that ground, Exxon would urge the Court to avoid making any ruling that would cast doubt on the validity of mandatory classes — including mandatory punitive damages classes — in cases involving competing claims against a limited fund. While the trial court below nominally (and belatedly) invoked Alabama Rule 23(b)(1)(B) as a secondary ground for certification, the court's primary ground, and the primary ground discussed on appeal in the Alabama Supreme Court, was that the class settlement, though it compromised claims for money damages, provided only injunctive relief and equitable restitution, and was therefore subject to mandatory class treatment under Alabama Rule 23(b)(2). The core issue in the case is whether the compromise of

such claims obviates any due process opt-out right that would otherwise apply under *Shutts*. If the Court holds, as it should, that due process does not forbid a non-opt-out class under Alabama Rule 23(b)(2), the case simply does not present the question whether due process requires an opt-out opportunity in the context of claims against a limited fund.

ARGUMENT

I. MANDATORY CLASSES SERVE IMPORTANT AND LEGITIMATE PURPOSES IN CASES INVOLVING COMPETING MONETARY CLAIMS AGAINST A LIMITED FUND

1. The Equitable Underpinnings of Limited Fund Class Actions

The modern-day mandatory class action has its roots in the seventeenth century English "bill of peace," a mandatory joinder device used in the chancery courts to bind entire classes of similarly situated claimants. *See In re Asbestos Litig.*, 90 F.3d 963, 986 (5th Cir. 1996); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 40-41 (1986); Zechariah Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932). Courts in this country have recognized mandatory class actions at least since *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), a case in which representatives of a plaintiff class of Methodist ministers sued to vindicate rights in a common fund. This Court upheld the suit on the ground that in cases involving a "common interest or a common right," a "court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all

of them the same as if all were before the court." *Id.* at 302-03.

In the ensuing 140 years, this Court consistently recognized the binding effect of traditional class action judgments, provided that absent class members received adequate representation. *E.g.*, *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938). In *Hansberry v. Lee*, 311 U.S. 32 (1940), the Court acknowledged that a "class" or "representative" suit was a "recognized exception" to the general rule that an *in personam* judgment can have no binding effect on persons not parties to the proceeding. *Id.* at 40; *see also Richards v. Jefferson County*, 116 S. Ct. 1761, 1766 (1996); *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (both reaffirming *Hansberry*).

None of these cases recognized or even suggested a due process right to opt out of a traditional class action. *See* 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 1.09 (1992) (describing "limited fund and other no opt-out class actions" recognized under former Equity Rule 38 (adopted in 1912)). Rather, as set forth in *Hansberry*, the critical precondition for binding absent class members in this type of class action was adequacy of representation. 311 U.S. at 42-43. Other cases suggest that due process also generally requires reasonable notice of the nature of the proceeding and the opportunity to object or participate,[3] but

[3] *See, e.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

none suggests a general due process right to opt out where the requisites of a traditional equitable class action are present.

The modern "opt-out" class action is of much more recent vintage, having as its precursor the so-called "spurious" class action first recognized in Rule 23 of the original Federal Rules of Civil Procedure adopted in 1938. This was in essence a permissive joinder device, designed as a vehicle to facilitate simultaneous adjudication of actions at law involving common issues, binding only to the extent that absent class members affirmatively opted *into* the class. *Newberg on Class Actions*, *supra*, §1.09. The 1966 amendments, which introduced the current federal rules, retained this device under Rule 23(b)(3), but substituted an opt-out procedure for the opt-in procedure provided in the 1938 rules.

Significantly, both the 1938 rules and the 1966 amendments also retained the traditional equitable non-opt-out class actions recognized at common law. The modern versions of these procedures are contained in Rules 23(b)(1) and (b)(2). As discussed in the next section, the traditional limited fund class action is specifically encompassed in Rule 23(b)(1)(B), the provision under which the District Court in Alaska certified the mandatory punitive damages class in *Exxon Valdez*.

2. Modern Cases under Rule 23(b)(1)(B)

Rule 23(b)(1)(B) expressly authorizes certification of mandatory (*i.e.*, non-opt-out classes) where:

> The prosecution of separate actions ... would create a risk of ... adjudications with respect to the individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1)(B).

This subsection "takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter." *Advisory Committee's Note to Proposed Amendments to Rule 23*, 39 F.R.D. 69, 100-01 (1966). The Advisory Committee contemplated specifically that this rule would apply in cases of competing monetary claims against a limited fund:

> In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by . . . representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.

Id. at 101.[4]

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[4] *See* also Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present and Future* 45 (1977) ("The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund . . . and there is a risk that if litigants are allowed to

As noted above, courts have applied the rule in a variety of contexts, including mass torts where the record establishes a substantial risk that individual actions by early claimants will so deplete the defendants' resources as to prejudice recoveries by later claimants. *See, e.g., In re Asbestos Litig.*, 90 F.3d at 982-87; *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 982 F.2d 721, 739 (2d Cir. 1992); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1418 (E.D.N.Y. 1989); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 712-13 (E.D. Mich. 1985); *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D. Ky. 1977).[5]

In such cases, mandatory class certification under Rule 23(b)(1)(B) prevents the "unseemly race to the court room door with monetary prizes for a few winners and worthless judgments for the rest." *Coburn*, 77 F.R.D. at 45. Indeed, even courts skeptical of certifying mass tort class actions under other provisions of Rule 23 have recognized the value of such certification where the requisite limited fund truly

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proceed on an individual basis those who sue first will deplete the fund and leave nothing for latecomers").

[5] Other courts, while holding open the possibility of such certification on a proper showing, have denied certification under Rule 23(b)(1)(B) on the ground that the record did not establish the requisite limited fund. *E.g., In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305-06 (6th Cir. 1984); *Jenkins v. Raymark Indus. Inc.*, 109 F.R.D. 269, 276-77 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

exists.[6] Instead, "[l]imited-fund class actions effect a pro-rata reduction of all claims in order to treat all claimants fairly. Thus, they sound in equity even though the relief they provide necessarily affects the amount of money damages the claimants can ultimately receive." *In re Asbestos Litig.*, 90 F.3d at 986. The procedure closely resembles actions for interpleader, or on the filing of a final account of a trustee or executor, as to which it is well established that absent parties may be bound without the right to opt out. *Id.* at 987; *In re Joint Eastern & Southern Dist. Asbestos Litig. (Findley)*, 878 F. Supp. 473, 478 (E. & S.D.N.Y. 1995), *aff'd in part and vacated in part on other grounds*, 78 F.3d 764 (2d Cir. 1996); *cf. Mullane*, 339 U.S. at 311-13.

As also noted above, courts have extended this principle to punitive damages in multiple claims situations where the record supports a conclusion that the first tried claims could exhaust legal limits on the aggregate amount of punitive damages for a single tort. The rationale was well articulated by Judge Weinstein, who certified such a class in the "Agent Orange" tort litigation:

> There must be . . . some limit, either as a matter of policy or as a matter of due process, to the amount of

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[6] *See Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 627 (3d Cir.) (declining to establish high threshold for commonality of issues required under Rule 23(a)(2) in context of putative Rule 23(b)(3) class action because it "might have repercussions for class actions very different from this case, such as a Rule 23(b)(1)(B) limited fund class action, in which the action presented claimants with their only chance at recovery"), *cert. granted*, 117 S. Ct. 379 (1996).

> times defendants may be punished for a single transaction . . . . At the very least, a trial court passing on future claims may admit evidence as to the payment to prior awards which may be used by a jury to reduce an award to a party seeking additional punishment for the same conduct . . . . There is, therefore, a substantial probability that "adjudication with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudication." Accordingly, a class of all [claimants] . . . [is] certified under [Rule 23](b)(1)(B) . . . for the award of punitive damages.

In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (quoting Fed. R. Civ. P. 23(b)(1)(B)), *mandamus denied sub nom. In re Diamond Shamrock Chem. Co.*, 725 F.2d 858 (2d Cir. 1984).

This Court, of course, has recently issued a series of decisions confirming that due process indeed limits the amount of permissible punitive damages. *See BMW of North Am., Inc. v. Gore*, 116 S. Ct. 1589, 1592 (1996); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

Class treatment of punitive damages claims is tailor-made for cases like *Exxon Valdez* in which huge numbers of claimants seek punitive damages for the same allegedly wrongful conduct. Mandatory certification in such cases protects not only the interests of plaintiffs seeking to share in the same pool of potential punitive damages, but also the

interests of the defendant and society as a whole in avoiding multiple punishments for the same acts. The latter concern has vexed courts, while eluding any solution, since the early days of mass torts. *See, e.g., Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-42 (2d Cir. 1967) (Friendly, J.) (warning of danger of punitive damages "overkill" in mass tort cases); *Dunn v. HOVIC*, 1 F.3d 1371, 1385-91 (3d Cir. 1993) (discussing concerns expressed about repetitive punitive awards in asbestos cases); *In re School Asbestos Litig.*, 789 F.2d 996, 1004 (3d Cir. 1986) ("powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts").

II. NEITHER *SHUTTS* NOR ANY OTHER DECISION OF THIS COURT SUPPORTS THE CREATION OF AN ABSOLUTE OPT-OUT RIGHT IN CLASS ACTIONS INVOLVING MONETARY CLAIMS

Petitioners' claim that due process requires a right to opt out of any class involving claims "wholly or predominantly" for money damages finds no support in this Court's due process jurisprudence. As respondents correctly point out, petitioners read far too much into *Shutts*, which concerns not the right to opt out generally, but rather the requirements for binding class members over whom a forum state has no independent basis for asserting personal jurisdiction. On the jurisdictional point, Exxon can add little to analysis

respondents have already given.[7] The *Shutts* reasoning has no applicability to cases where class members have minimum contacts with the forum (as was indisputably the case in *Exxon Valdez*),[8] where they have expressly or impliedly

[7] It bears note, however, that the *Shutts* opinion discusses jurisdictional constraints in the context of *state* court class actions only. Federal courts often have broader jurisdictional reach than the courts of the states in which they sit, as when Congress has enacted statutes authorizing nationwide service of process. *See United States v. Union Pacific R.R.*, 98 U.S. 569, 603-04 (1878) ("nothing in the Constitution ... forbids Congress to enact that ... any [federal trial court] ... shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision"); *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 442 (1946); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (federal court's jurisdiction to adjudicate federal securities claims extended to all persons with minimum contacts with the United States). Likewise, in cases involving pre-trial transfers under 28 U.S.C. § 1407, the federal multidistrict litigation statute, courts have held that a multidistrict transferee court may constitutionally exercise jurisdiction, for pre-trial purposes including settlement, over all persons having minimum contacts with any transferor forum. *See In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1434-35 (2d Cir. 1993); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987). *But see Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (applying *Shutts* in context of mandatory settlement class certified by § 1407 transferee court; no discussion of possibility of jurisdiction based on class member's minimum contacts with transferor forum), *cert. dismissed*, 511 U.S. 117 (1994).

[8] *See Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 n.8 (3d Cir. 1994).

waived any jurisdictional objection,[9] or where they are otherwise subject to the forum court's jurisdiction.[10]

It bears emphasis, moreover, that *Shutts* expressly declined to extend its jurisdictional holding to class actions seeking "equitable relief," 472 U.S. at 811 n.3, and that the case concededly did not involve a limited fund. *See id.* at 820 ("there is no specific identifiable *res* in Kansas, nor is there any limited amount which may be depleted before every plaintiff is compensated").[11] More recent cases, analogizing Rule 23(b)(1)(B) limited fund class actions to their equitable antecedents, have concluded that *Shutts* does not mandate an opt-out right in such actions.[12]

Respondents are similarly correct in their conclusion that no due process right to opt out may be implied under the

[9] *See DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175-76 (8th Cir. 1995); *White v. National Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d at 292.

[10] *See In re Joint Eastern & Southern Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996) (*quasi in rem* jurisdiction over beneficiaries of a trust created in the forum state).

[11] The same is true of the other principal cases on which petitioners and the *amici* supporting their position rely. *See, e.g., Holmes v. Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983) (applying *Shutts* in non-limited fund case certified under Rule 23(b)(2)); *Brown*, 982 F.2d at 389 & n.2 (applying *Shutts* in non-limited fund case certified under Rules 23(b)(1)(A) and 23(b)(2), but *not* 23(b)(1)(B)).

[12] *See In re Asbestos Litig.*, 90 F.3d at 987; *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. at 714.

three-part test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Petitioners' *Mathews* argument is especially weak in the context of limited fund class actions certified under Rule 23(b)(1)(B). To the extent the rule impairs any property interest of any given claimant, it does so only to the extent necessary to prevent impairment of the property interest of other, equally deserving claimants. Under the third *Mathews* factor, the "burdens" that petitioners' proposed opt-out right "would entail" would fall directly on later claimants, making for a compelling case against allowing such opt-outs.[13]

Petitioner's argument is still weaker in the context of *punitive* damages claims, which do not raise a "private interest" — the first *Mathews* factor — at all. Punitive damages vindicate not private interests but the quintessentially sovereign right of the public to punish and deter misconduct. They are "fundamentally collective," *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995), and "are awarded for the public benefit — the collective good." *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996). "[T]he state and not the victim is considered the true party plaintiff." *Id.* A punitive

[13] It bears noting as well that petitioner's proposed opt-out right would do little, if anything, to ameliorate the alleged problems of class action "abuse" discussed in the briefs filed by the *amici* trial lawyer organizations. The potential for such abuse exists equally in both opt-out and non-opt-out class actions. The solution is not to eliminate the useful tool of non-opt-out class actions — thereby throwing out the baby with the bathwater — but rather, as the *amici* state attorneys general suggest, to enforce diligently the existing requirements of notice and adequate representation. These safeguards apply to *all* class actions and — unlike the proposed opt-out right — are directly responsive to the perceived abuses.

damage claim is therefore never a *private* claim; rather, a plaintiff who seeks punitive damages acts, by definition, as a "private attorney general" to protect a "public interest." For this reason the state has been held to have the power to eliminate punitive damages claims altogether. *In re Paris Air Crash*, 622 F. 2d 1315, 1319-20 (9th Cir. 1980) (Kennedy, J.). As the court said:

> [T]he wrongful death statute allows full compensation for loss of companionship and financial support. Plaintiffs seek in addition . . . the opportunity to act as private attorneys general to effect the deterrence and retribution functions of [the state's punitive damage law]. *So far is this right from being a fundamental personal right that it is an interest not truly personal in nature. It is rather a public interest* . . . .

Id. (emphasis added); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct").

III. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO CONSIDER THE CONSTITUTIONALITY OF LIMITED FUND MANDATORY CLASSES

Given a proper reading of *Shutts*, the Court could affirm the judgment below on any of a number of alternative grounds. As respondents point out, to the extent that any of the objecting class members lacked minimum contacts with the Alabama forum, they waived any jurisdictional objection

by affirmatively litigating the merits of the class settlement (*see* cases cited in note 9 *supra*). Likewise, Exxon agrees with respondents that the inclusion of monetary relief applicable to a small number of injured claimants in a settlement providing predominantly equitable and injunctive relief does not disqualify the settlement class from certification under Rule 23(b)(2), and does not require a right to opt out. Whether the Court agrees or disagrees with these grounds, however, Exxon respectfully urges it to avoid any decision that would cast doubt on the validity of mandatory classes — including mandatory punitive damage classes — in cases involving competing claims against a limited fund.

Although the trial court in this case nominally invoked Alabama Rule 23(b)(1)(B) as a secondary ground for certification, the parties have all but ignored it in their respective presentations to this Court. Petitioners' position appears to be that certification under Rule 23(b)(1)(B) was both procedurally and factually improper (Pet. Br. at 30 & n.15). If that is so, this case plainly is *not* an appropriate case for review of the constitutionality of a true limited fund class action. The parties have focused their dispute on whether due process requires the right to opt out when putative claims for money damages are compromised in a class settlement certified under Rule 23(b)(2) on the ground that it provides predominantly injunctive relief and equitable restitution. If the court holds, as it should, that due process does not forbid a non-opt-out class in such circumstances, there is no need to reach the question whether due process requires an opt-out opportunity in the context of claims against a limited fund. And the unquestioned utility of the limited fund class action in the management of major

litigation provides an excellent reason why the Court should *not* reach out beyond what this case requires, and should avoid casting doubt on the viability of such actions.

CONCLUSION

For all the reasons stated above, *amicus curiae* Exxon Corporation respectfully urges the Court to affirm the judgment below.

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